

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

75-6046

75-6046

Clement Nugent

B

V.

H. E. W.

Brief and Appendix



JUN 16 1975

Clement B. Nugent V. Secretary of Health, Education and Welfare

FACTS

This may seem a waste of time, but to me, it is a matter of principle. According to Mr. Illmensee this is a second claim, the first having been discarded and never looked into by the Board of Appeals of H.E.W. If this is so, Why would I have bothered to file suit? and Why, when I went to the Social Security office on East Twenty-second Street, was I told, they (H.E.W.) owed me fifteen months in back payments? Had I been told the payments would not be paid from September 1968 through December 1969, I would have neither bothered you or aggravated my health.

From the beginning my husband had been told by his doctors that he could not return to work, because of the drug prednisone prescribed for the hemorrhages behind his left eye. Had this been his only problem the decision would have been accepted, but he had tuberculosis, contracted while in the United States Army-Japanese area. The drug prednisone could, and according to my doctors is known to, reactivate this contagious disease. I have lived with this disease since 1948 and am well aware of how little it takes to flare up.

We lived a very quiet life. We gave up much to keep him well. He was subject to many bouts of pneumonia, this too has been documented. To add insult to injury he had no useful hearing in the right ear; this do to another drug taken for the control of the tuberculosis. This drug is called dihydrostreptomycin. It was prescribed when the tuberculosis spread from the left to the right lung. My husband had a long period of convalescence after the spread, from late 1952 through 1953.

My husband did two things; he worked and he slept. He

worked as a longshoreman because the pay was good and he did not have to show if he did not feel up to par.

We would not think of taking long trips or having parties other than for very special occasions. He was just not up to them. He was most interested in seeing his children grown and educated. He almost made it; his youngest child graduated from college in February 1975.

I could not get down to the court to read the case. My daughter copied the heading and numbers of the Index.

I received a letter, hand delivered, called a "Suggestion of Death of Plaintiff". I wish the death was just a suggestion. It is a nightmare. I would have preferred that it never happened but we have no control over death.

I then was summoned to the court or chambers of Walter Bruchhausen. He did none of the talking. His secretary did it all. As had happened each and every time before, Mr. Illmensee was not ready. Remember this had been going on since 1970. Because I was so stupid, I believed Mr. Illmensee when he told me that by my husband's giving them (H.E.W.) sixty days he was not hurting his own claim. Note the memo to Robert. He came to my home to have the papers signed. The papers could not have been sent and returned before January 2, 1972 which was the deadline. Robert was instructed to return the paper December 30, 1971. This memo was included in my notice of motion to the appeal of civil action, 71C-1412.

Judge Bruchhausen's secretary asked Mr. Illmensee when he would be ready. I asked the secretary if, when Mr. Illmensee was ready, I could send in my statement. Because I have a chronic back problem he said yes, but I never received such a request. The

decision was rendered on the brief submitted by Mr. Illmensee.

I would bring your attention to a letter dated July 10, 1969. It was notarized and signed by me. The letter is missing from the book. I did write and ask that these papers be returned to me if they were not going to be used. Some of the papers were returned to me, some were not: photostats of the documented visits made by my husband to Dr. Charles Schuman were included while the letters from Dr. Jerome Block as well as my letters were excluded. You know as well as I do that photostats of all the materials were made. They were all sent at the same time.

There are many omissions in the book. The opinion of Dr. Roger M. Rose, consulting ear specialist at Lenox Hill Hospital, is a good example.

My husband was neither examined by an ear nor a chest man. The decision was solely on the eye problem, which, in itself, was being treated up until the time of his death. From March 1968 until his death in March 1973, my husband was under the care of Dr. Jerome M. Block, the Director of Neurology at Lenox Hill Hospital, Dr. John Sauer, consulting ophthalmologist at Lenox Hill Hospital, and Dr. Charles Schuman.

As his condition worsened, we had to hire a car service to transport him to his doctors.

A number of the statements made by Mr. Illmensee in his Memorandum of Law (JDP:TAI:ec F. #714266) are not in agreement with the facts. The most flagrant errors are

1. page 2 - Mr. Illmensee states that the Appeals Council refused to review the decision. In fact the Appeals Council did review the decision. The review did not go in our favor, but did the Council have all the papers or had some of them disappeared from the file.

2. Mr. Illmensee alleges that the plaintiff's deafness in one ear, loss of part of a finger, and partial paralysis on the left side were added conditions. All of the conditions had been included in the first letter for reconsideration of the plaintiff's claim. The letter is dated December 13, 1968. It is included in the book. His hip ailment was included in the letter sent to the board of appeals. It had been x-rayed and he was having difficulty walking. The letter is missing from the book. A certified copy was sent to Judge Rosberg; the copy is dated July 10, 1969. My husband was readmitted to Lenox Hill Hospital in August 1969. I had no reason to question his not being disabled from September 1968. The Veteran's Administration considered him disabled (one hundred per cent disabled) as of March 23, 1968, a copy of this paper was included in my original motion of November 2, 1970.

The service-connected tuberculosis rendered my husband one hundred per cent disabled from July 1948 through the late nineteen fifties. If necessary I will find the exact date. The tuberculosis was not a new ailment.

3. To my knowledge, and I had the prescriptions filled, my husband was never taken off the drug prednisone. He had to be taken off the drug dihydrostreptomycin because it not only rendered him deaf in one ear but was affecting his other ear and taking his speech. He was told one more infection could render him speechless. You will note on page 109 in the book that Dr. Block states the tuberculosis condition limited the treatment for my husband's eye condition. You will note on page 141 of the book the statement of Dr. Roger M. Rose and its date. My husband kept his driver's license, but

would not drive a car while he was on medication.

My husband made his coffee in the morning. If he had to cook his meals he would not eat. He walked my daughter to the Avenue in the morning to pick up the papers. It would not have been good for him to become so weak that he could not move.

During the hearing the hearing examiner Mr. George Allen had my husband move from the head of the long table to a seat between himself and his secretary. My husband's good ear was facing Mr. Allen. My husband had signed a paper for me to represent him, but when my husband did not understand the question Mr. Allen was asking, I was not allowed to explain it to my husband.

It has been deleted from the record that Mr. Feld suggested my husband could be a glassblower - with two bad lungs.

All of the tests done on my husband were done at the same time (in March and April of 1968) at Lenox Hill Hospital. His further hospitalization had no bearing on the claim filed in September 1968. Social Security representatives told me to have a further hearing and how to file suit, if it did not work out. My daughter went to a meeting of the local One parent group because they had a representative from Social Security there to help widows with their social security problems. He told the rules and regulations, I had been told. When my daughter got up and told him what had happened to me and what I had to go through he looked at her in disbelief. The representatives are not told how the system works themselves.

Please take note that I cannot appear in court, but if permissible my daughter will go for me.

In conclusion, please note the letter written by Mr. Allen to Dr. Schuman (page 118 in the book) and Dr. Schuman's answer to

Mr. Allen on the same page.

Agnes R. Nugent
(Mrs. Clement B. Nugent)

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APPEAL - GUNHAUSEN. KOSLING, J.

ATTORNEYS

For Photo of: Nugent/
1606 Albany Av.
K 11210 GE48477

vs.

SECRETARY OF HEALTH, EDUCATION and WELFARE

For Defendant:

U. S. ATTORNEY

RY TRIAL CLAIMED

[illegible]

RECEIPTS, REMARKS, ETC.

AMOUNT



DATE	FILINGS - PROCEEDINGS	AMOUNT ENTERED IN EMOLUMENT RETURN.
2/71	Complaint filed. Summons issued.	1 JS5
3/71	Summons returned & filed/executed	2
3-72	By ROSLING, J.- Order on stip filed extending time for deft to answer complaint to 2-29-72.	3
29-72	Notice of motion and memorandum filed, pursuant to Rule 12(b)(1) (2)(6) etc dismissing action etc. (ret Mar 17, 1972)	4/5
4/14/72	Application of Agnes Nugent filed.	6
4/17/72	Before Rosling, J.- Case called for hearing on deft's motion to dismiss-Marked off-See order endorsed on reverse of paper #4	
4/17/72	By Rosling, J.- Order filed directing that motion of deft to dismiss be marked off pending filing of SEC HEW's return & that answer of SEC HEW to be filed with return. (See order endorsed on reverse of paper #4)	--
4/17/72	Pltff's supplemental papers filed.	7
5/72	Affidavit of Thos. A. Illmensee filed.	8
5/2/72	Before Rosling, J.- Case called & adj'd to 9/8/72 for hearing on motion for summary judgment.	
5-9-72	ANSWER filed.	9
5-9-72	Certified copy of entire record of proceedings relating to the application of Clement B. Nugent etc filed.	10
5-9-72	Notice of motion filed for an order restoring the Gov't motion to dismiss etc. (ret June 29, 1972)	11
5/27/72	Application of Agnes Nugent filed.	12
5/27/72	(Copy) Deft's memo of law submitted by pltff filed.	13
5/29-72	Before ROSLING, J.- Deft's motion to restore Gov't motion to dismiss etc. - Motion submitted.	
5-3-72	By ROSLING, J.- Memorandum & order dtd 6-30-72 filed. The motion to dismiss the action is granted - etc. The Clerk is directed to forward copies of this memorandum & order to Clement B. Nugent and to Hon Robert A. Morse U.S. Atty. (copy of above memorandum & order mailed to Mr. Clement B. Nugent, 1606 Albany Ave. Bklyn, N.Y. 11210 and to Hon Robert A. Morse U.S. Atty, 225 Cadman Plaza East Bklyn, N.Y. 11201)	14
5/7/73	Affidavit of Thoman A. Illmensee filed.	15
5/7/73	By Rosling, J.- Order dtd 2/24/73 relieving pltff of idemt & order of this court dtd 6/30/72 dismissing the action filed. (p/c-mailed to att'ys).	16

Continued

CIVIL DOCKET

DATE	FILINGS--PROCEEDINGS	CLERK'S FEES		AMOUNT RECORDED IN ENCLOSURE RETURNS
		PLAINTIFF	DEFENDANT	
30-73	Before ROSLING, J. - Case called. No appearance on behalf of plttf. Marked off.			
16-73	Suggestion of death of plttf filed.			17
5/8/73	Certified copy of suggestion of death of plttf. returned & filed/executed.			18
5-24-73	Letter from Plttf dtd 5-22-73 filed.			19
7-23-73	Notice of motion to amend caption filed.			20
7-23-73	By BRUCHHAUSEN, J. - Order dtd 7-20-73 amending caption filed on document #20.			--
10-10-73	By BRUCHHAUSEN, J. - Memorandum order dtd 10-10-73 setting 10-24-73 at 10 A.M. for conference filed.			21
10-73	Notice of motion for judgement on pleadings & Memorandum of law filed.			22/23
11-74	By BRUCHHAUSEN, J. - Memorandum and order dtd 1-11-74 dismissing complaint filed. (copy mailed to plttf).			24
13-74	Notice of appeal filed. Duplicate mailed to CoFA & deft. jn			25
13-75	Notice of motion for record of case to be transmitted to the Court of Appeals filed.			26
20-75	Record on appeal certified and mailed to C of A.			

TRUE COPY ATTEST
 6/22/75
 DEPUTY CLERK
[Signature]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x
AGNES R. NUGENT, As Administratrix, :
etc., of CLEMENT B. NUGENT, deceased, :

Plaintiff, :

-against- :

SECRETARY OF HEALTH, EDUCATION and :
WELFARE, :

Defendant. :

No. 71 C 1412

January 11, 1974

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Appearances:

AGNES R. NUGENT, Pro Se

EDWARD JOHN BOYD V, ESQ.
Acting United States Attorney
Eastern District of New York
Attorney for Defendant
By: THOMAS A. ILLMENSEE, ESQ.
Assistant United States Attorney

BRUCHHAUSEN, D. J.

The defendant moves for judgment on the pleadings,
pursuant to Rule 12(c) of the Federal Rules of Civil Pro-
cedure.

This action was commenced, pursuant to 42 U.S.C.A. §405(g), for a judicial review of the final decision of the Secretary of Health, Education and Welfare. The Secretary's authorized representative conducted hearings and ruled that the claimant was not entitled to the establishment of a period of disability, pursuant to Section 216(i) or to disability insurance benefits, pursuant to Section 223, of the Social Security Act. The Appeals Council of the Social Security Administration, by letter, dated September 2, 1971, affirmed the decision of the hearing examiner. The plaintiff exhausted all administrative appeals, and now seeks a judicial review.

The Congress of the United States in its enactment of the Statute, has limited the power of a District Court to a review of the proceedings, had before the Social Security Administration. The governing Statute, 42 U.S.C.A. §405(g), states:

"The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive ***."

See Price v. Folsom, 168 F. Supp. 392, affirmed 280 F.2d 956, certiorari denied 365 U.S. 817; Easttam v. Secretary of Health, Education and Welfare, 364 F.2d 509 (1966); Richardson v. Perales, 402 U.S. 389.

The Court, after consideration of the record, arguments, and applicable law, concludes that there was ample substantial evidence to justify the administrative determination.

The motion of the defendant is granted, and it is hereby ordered that judgment on the pleadings in favor of the defendant be and the same is hereby granted and entered.

It is so ordered.

Copies hereof have been forwarded to the respective parties.

Walter Bruckhausen
Senior U. S. D. J.